CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 377

ASA H. WHITFIELD, PETITIONER,

vs.

THE STATE OF OHIO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

PETITION FOR CERTIORARI FILED AUGUST 19, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No.

ASA H. WHITFIELD, PETITIONER,

vs.

THE STATE OF OHIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

INDEX.

	Original	Print
Record from Municipal Court of City of Cleveland, Ohio	1	1
Affidavit of R. C. Kissack	1	1
Warrant of arrest	3	2
Demurrer	5	3
Motion for new trial	6	4
Motion in arrest of judgment and for discharge of defendant	8	5
Journal entries	10	6
Clerk's certificate (omitted in printing)	10	
Bill of exceptions	11	7
Stipulation of facts	14	8
Testimony of R. C. Kissack	16	8
Asa H. Whitfield	16	9
Finding of guilt	19	10
Motion for new trial overruled	19	11
Sentence of defendant	19	11
Order allowing bill of exceptions	21	12
Stipulation of facts	22	12
Record from Court of Appeals	24	14
Petition in error	24	14
Docket entries	27	15

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 13, 1935.

—6762-C

	Original	Print
Journal entry of judgment	27	15
Mandate	29	16
Proceedings in Supreme Court of Ohio	31	17
Petition in error	31	17
Motion in Court of Appeals to certify record to Supreme Court	36	20
Application for stay of sentence and judgment	39	21
Order suspending judgment	41	22
Motion to strike petition in error	42	23
Application for rehearing	44	23
Docket and journal entries	50	27
Order dismissing petition in error	52	29
Order denying application for rehearing	52	29
Clerk's certificate ..... (omitted in printing)	53	

[fols. 1 & 2]

IN THE MUNICIPAL COURT OF CLEVELAND

AFFIDAVIT OF R. C. KISSACK—Filed Oct. 2, 1934

THE STATE OF OHIO,
Cuyahoga County,
City of Cleveland, ss:

Before me, Paul D. Grandis Deputy Clerk of the Municipal Court of the City of Cleveland, personally came R. C. Kissack who being duly sworn according to law, deposeth and saith, that on or about the 2nd day of October A.D. 1934 at the City of Cleveland in said County of Cuyahoga, one Asa H. Whitfield did unlawfully sell on the open market, certain goods, wares or merchandise, to-wit: one dozen Chambray men's work shirts, which said merchandise was manufactured in whole or in part by convicts or prisoners at Wetumpka Prison in the State of Alabama; said prisoners so manufacturing said articles at the time of manufacturing same not being on parole or probation.

2nd Count

R. C. Kissack, who being duly sworn according to law, deposeth and saith, that on or about the 2nd day of October, A.D. 1934, at the City of Cleveland in said County of Cuyahoga, one Asa H. Whitfield did unlawfully sell for shipment to R. C. Kssack, via railway express from Wetumpka Prison in the State of Alabama to R. C. Kissack in the City of Lakewood, Ohio, certain goods, wares or merchandise, to-wit: six dozen Chambray men's work shirts, which said merchandise was manufactured in whole or in part by convicts or prisoners at the Wetumpka Prison in the State of Alabama; said prisoners so manufacturing said articles at said time not being on parole or probation and further deponent says not, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Ohio.

X (Signed) R. C. Kissack.

Sworn to and subscribed before me, this 2 day of October, A. D. 1934. Paul DeGrandis, Deputy Clerk of the Municipal Court of Cleveland. (Seal.)

(Signed) Ezra J. Shapiro, Prosecuting Attorney, the Municipal Court of Cleveland.

[fol. 3] IN MUNICIPAL COURT OF CLEVELAND

WARRANT OF ARREST

THE STATE OF OHIO,
Cuyahoga County,
City of Cleveland, ss:

To the Bailiff of The Municipal Court of Cleveland, Greeting:

Whereas, Complaint upon oath by R. C. Kissack has this day been filed with me, Peter J. Henry, Clerk of the Municipal Court of the City of Cleveland, that on or about the 2nd day of Oct. A.D. 1934, at said City and County, one Asa H. Whitfield did unlawfully sell on the open market, certain goods, wares or merchandise, to-wit, one dozen Chambray men's work shirts, which said merchandise was manufactured in whole or in part by convicts or prisoners at Wetumpka Prison in the State of Alabama; said prisoners so manufacturing said articles at the time of manufacturing same not being on parole or probation.

2nd Count

R. C. Kissack, who being duly sworn according to law, deposeth and saith, that on or about the 2nd day of October, A. D., 1934, at the City of Cleveland in said County of Cuyahoga, one Asa H. Whitfield did unlawfully sell for shipment to R. C. Kissack, via railway express from Wetumpka Prison in the State of Alabama to R. C. Kissack, in the City of Lakewood, Ohio, certain goods, wares or merchandise, to-wit; six dozen Chambray men's work shirts, which said merchandise was manufactured in whole or in part by convicts or prisoners at the Wetumpka Prison in the State of Alabama; said prisoners so manufacturing said articles at said time not being on parole or probation, contrary to the form of Statute in such cases made and provided.

These are therefore, in the name of the State of Ohio, to command you that you take the said Asa H. Whitfield if he be found in your County, or if he shall have fled, that you pursue after the said defendant into any County in the State, and safely keep the said defendant so that you [fol. 4] have — forthwith before our Municipal Court, to

answer to said complaint, and be dealt with according to law.

Given under my hand, and the seal of said Court, this 2nd day of Oct. A. D. 1934.

Peter J. Henry, Clerk of the Municipal Court of Cleveland, by (Signed) Paul DeGrandio, Deputy Clerk of the Municipal Court of Cleveland. (Seal.)

[fol. 5] IN THE MUNICIPAL COURT OF CLEVELAND, CRIMINAL BRANCH

No. —

THE STATE OF OHIO, Plaintiff,

vs.

ASA H. WHITFIELD, Defendant

DEMURRER

Comes now the defendant herein and demurs to the warrant issued in the above entitled cause for the reason that same does not charge an offense, all as set forth in the Brief hereto attached.

(Signed) Malcolm E. Molner, Attorney for Defendant.

Notice

Notice is hereby given that the above demurrer will be on for hearing in the Police Court, at the Central Police Station, in Court Room #3 on the 3rd day of October, 1934, at 9:00 o'clock A. M. or as soon thereafter as may be convenient for the Court.

(Signed) Malcolm E. Molner, Attorney for Defendant.

Notice

Notice of the filing of the above demurrer is hereby acknowledged by receipt of copy this 3 day of October, 1934.

(Signed) Michael A. Picciano, Police Prosecutor.

[fol. 6] IN THE MUNICIPAL COURT OF CLEVELAND

[Title omitted]

MOTION FOR NEW TRIAL—Filed Oct. 4, 1934

Comes now the defendant in the above entitled cause and moves this Honorable Court that a new trial be granted to the defendant in the above entitled cause for the following reasons; to-wit:

1. That the Court erred in overruling the demurrer filed by the defendant.

2. That the Court erred in overruling defendant's objection to the introduction of any and all evidence.

3. That the Court erred in overruling the defendant's motion for a directed verdict.

4. That the verdict is not sustained by sufficient evidence.

5. That the verdict is contrary to law.

6. That the verdict is contrary to the Constitution of the United States of America.

7. For other errors of law occurring at the trial, as indicated by the record.

(Signed) Malcolm E. Molner, Attorney for Defendant.

[fol. 7] Notice

Notice is hereby given that the above motion will be on for hearing in Court Room #3, Police Court of the City of Cleveland, on the —— day of October, 1934, at —— o'clock or as soon thereafter as may be convenient to the court.

(Signed) Malcolm E. Molner, Attorney for Defendant.

Acknowledgment

A copy of the above motion has been received this 4 day of October, 1934.

(Signed) J. J. P. Corrigan, Police Prosecutor.

Brief

The Court will refer to the Brief of the Defendant heretofore filed and attached to the demurrer which Brief so filed is made a part hereof as though fully rewritten.

(Signed) Malcolm E. Molner, Attorney for the Defendant.

[File endorsement omitted.]

[fol. 8] IN THE MUNICIPAL COURT OF CLEVELAND

[Title omitted]

MOTION IN ARREST OF JUDGMENT AND DISCHARGE OF DEFENDANT

Now comes Asa H. Whitfield, the Defendant in the above entitled cause and moves that judgment therein be arrested; that the warrant be dismissed and the Defendant be discharged, for the following reasons, to-wit:

1. The warrant charges no offense.

2. The evidence shows that the offense with which the Defendant is charged is a transaction in Inter-State Commerce and beyond the power of the State of Ohio to regulate or control.

3. The evidence shows that the offense with which the Defendant is charged is having in his possession for sale, merchandise in the original package and is a transaction in Inter State Commerce and beyond the power of the State of Ohio to regulate or control.

4. The evidence shows that the offense with which the Defendant is charged is offering for sale merchandise in the original package and is a transaction in Inter-State Commerce and beyond the power of the State of Ohio to regulate or control.

5. The activity in which the evidence shows the Defend-
[fol. 9] ant is engaged is transaction in Inter-State Commerce, which the United States alone has the power to regulate or control.

6. The Defendant is denied due process of law to which he is entitled under the Fourteenth Amendment to the Constitution of the United States of America.

7. The act of Congress known as the Hawes Cooper Act (Forty-Five Statutes at Large, p. 1084, Ch. 79) under which the State of Ohio claims the power to arrest and prosecute the Defendant on the grounds charged in the warrant, is invalid and unconstitutional and beyond the power of the Congress to enact.

8. That the evidence fails to show that there is anything injurious, harmful or deleterious about the goods sold.

9. That there is nothing injurious, harmful or deleterious about the goods sold.

(Signed) Malcolm C. Mulner, Attorney for the Defendant.

[fol. 10] IN THE MUNICIPAL COURT OF CLEVELAND

[Title omitted]

JOURNAL ENTRIES

Oct. 3, 1934—Defendant in Court, affidavit filed, warrant issued and returned, defendant pleads not guilty. Demurrer filed, and same overruled, hearing had, and he is found guilty, and sentenced to pay a fine of twenty-five dollars and the costs. Defendant gives notice of a motion for a new trial, same overruled. Defendant excepts, and gives notice to prosecute error proceedings. Case continued to Oct. 13, 1934.

Oct. 13, 1934—Bill of Exceptions signed, sealed, and allowed.

Oct. 16, 1934—Original papers and Bill of Exceptions sent to the Court of Appeals.

March 1, 1935—On this day a mandate was received from the Court of Appeals, of Ohio, eighth district, affirming the judgment. Case continued to Mar. 8, '35.

March 8, 1935—Defendant in Court, case continued to April 16, and from then to May 16, and June 17, 1935.

Clerk's certificate to foregoing paper omitted in printing.

[fols. 11 & 12] IN THE MUNICIPAL COURT OF CLEVELAND

[Title omitted]

DEFENDANT'S BILL OF EXCEPTIONS

Appearances:

On behalf of the State of Ohio: Michael A. Picciano, Chief Police Prosecutor; J. J. P. Corrigan, Assistant Police Prosecutor.

On behalf of the Defendant: Malcolm E. Molner, Esq.

[fol. 13] [Title omitted]

Be it rememberd, That at the October, A. D. 1934, term of said court, to-wit, on Wednesday, October 3, A. D. 1934, this case came on to be heard, in Court Room 3, (Criminal Branch) before Honorable George S. Tenesy, one of the judges of said court, at which time the following proceedings were had:

Mr. Molner: Your Honor, there was a demurrer filed by the Defendant.

The Court: Yes, overruled.

Mr. Molner: Exception. If your Honor please, at this time, on behalf of the Defendant, we object to the introduction of any evidence on behalf of the State of Ohio for the reason that the warrant, and the information therein, does not charge an offense.

Mr. Corrigan: I would like your Honor to overrule that, [fol. 14] and we will submit, by stipulation, an agreed statement of facts.

The Court: Overruled.

Mr. Molner: The Defendant excepts to the overruling of that objection. We then have a stipulation of facts that I think ought to be read into the record.

Mr. Corrigan: I will read this stipulation now.

"It is hereby agreed and stipulated by and between counsel for the State of Ohio and counsel for the Defendant, that the facts and the evidence in the above captioned case is as follows: Stipulation as to First Count.

"That on the 2nd day of October, A. D. 1934, the Defendant, Asa H. Whitfield of Montgomery, Alabama, as agent for the State of Alabama, sold to R. C. Kissack, in the City

of Cleveland, Ohio, on the open market, to-wit, at the Cleveland Hotel, one dozen Chambray men's work shirts for the consideration of $5.25; that said shirts were manufactured in whole by prisoners, confined in Wetumpka Prison in the State of Alabama; that said prisoners at the time of manufacturing said shirts were not on parole or probation; that said shirts were shipped into the City of Cleveland, Ohio, via U. S. Parcel Post from Wetumpka Prison, State of Alabama, to be sold on the open market, in said City of Cleveland, Ohio; that said goods were sold in the original package, as shipped by interstate commerce into the State of Ohio; that there is nothing harmful, injurious or deleterious about the goods sold."

(Now, this is a stipulation as to the second count, your Honor please:)

"That on the 2nd day of October, A. D. 1934, the Defend-
[fol. 15] ant, Asa H. Whitfield, of Montgomery, Alabama, as agent for the State of Alabama sold to R. C. Kissack, in the City of Cleveland, Ohio, on the open market, to-wit, at the Hotel Cleveland, six dozen chambray men's work shirts for the consideration of $31.50; that the said shirts were not then delivered to the said R. C. Kissack but the Defendant, Asa H. Whitfield, agreed to ship same to the residence of R. C. Kissack which is in Lakewood, Ohio, via Railway Express, from Wetumpka Prison, in the State of Alabama; that the said shirts have been manufactured in whole by prisoners confined in Wetumpka Prison in the State of Alabama; that said prisoners at the time they manufactured said shirts, were not on parole or probation; that said goods were sold in the original package as shipped, by interstate commerce into the State of Ohio; that there is nothing harmful, injurious or deleterious about the goods sold."

Which stipulation is hereto attached and made a part of this bill of exceptions, the same as is set forth at length herein.

[fol. 16] Thereupon the State, further to maintain the issues on its behalf to be maintained, called as a witness one R. C. Kissack, who, being first duly sworn, testified as follows:

Direct examination of R. C. Kissack.

By Mr. Corrigan:

Q. Now, your name?
A. R. C. Kissack.
Q. Now, Mr. Kissack, have you heard the stipulation read?
A. I have.
Q. Are the facts contained in this stipulation true as you know them?
A. Yes.

Mr. Corrigan: That is all.
Mr. Molner: That is all.
Mr. Corrigan: The State rests with that, your Honor.
Mr. Molner: If your Honor please, at this time, on behalf of the Defendant, we move that the warrant be quashed and the Defendant discharged for the reason that the warrant does not show any offense on which the Defendant can be charged.
The Court: Overruled.
Mr. Molner: Exception.

Thereupon the Defendant, Asa H. Whitfield, to maintain the issues on his behalf to be maintained, offered himself as a witness and, having been first duly sworn, testified as follows:

[fol. 17] Direct examination of Asa H. Whitfield.

By Mr. Molner:

Q. Your name is Asa H. Whitfield?
A. Yes.
Q. You have heard the stipulation, Mr. Whitfield, that has been read?
A. Yes, sir.
Q. Those facts are substantially correct, are they?
A. Yes, sir.
Q. You are the defendant in the case?
A. I am.
Q. And your defense is that the law, as passed, is unconstitutional under the Federal Constitution?
A. Yes.

Q. That it violates the Federal Constitution?
A. Yes.
Q. And you are the agent of the State of Alabama?
A. Yes.

Mr. Molner: That is all.
Mr. Corrigan: No cross-examination.
Mr. Molner: That is all.

Thereupon the State of Ohio rested.
Thereupon the defendant rested.
Testimony closed.

[fol. 18] Mr. Molner: The Defendant renews the motion, your Honor.
The Court: Overruled.
Mr. Molner: Exception.

The above and foregoing, together with the stipulation heretofore read into evidence, and which is attached to and made a part hereof, was all of the evidence offered and received upon the trial of this case in said Municipal Court of Cleveland, in and for Cuyahoga County, Ohio.

Mr. Corrigan: If your Honor please, the minimum penalty for the first offense, or violation of this Section, is $25 and costs. I ask your Honor to assess the fine at this time.
Mr. Molner: We would like your Honor to set an appeal bond. This matter, of course, is going to be appealed, and we will have a bondsman down here in the next 20 minutes.
The Court: The entry will be "Defendant found guilty, $25 and costs; motion for new trial overruled; Defendant excepts, and notice of intention to appeal."
Mr. Molner: I would suggest a hundred dollar bond would be sufficient.

[fol. 19] FINDING OF GUILT

Thereupon, after the arguments of counsel, and after due consideration, the Court found the Defendant Asa H. Whitfield guilty of G.C2028-1 as charged in the first and second counts, as appears of record in this case; to which finding and decision of the Court counsel for the Defendant then and there duly excepted.

Motion for New Trial Overruled

And thereafter, at the October, A. D. 1934, term of said court, to-wit, on the 3rd day of October, A. D. 1934, being within three days after the rendition of said verdict, and within the time fixed by law, the Defendant filed his motion for a new trial of this case, which said motion is a part of the record in this case, for the reasons and upon the grounds in said motion stated and set forth.

And thereafter, at the October, A. D. 1934, term of said court, to-wit, on the 3rd day of October, A. D. 1934, said motion for a new trial was overruled by the Court, as appears of record in this cause; to which ruling of the Court counsel for the Defendant then and there duly excepted.

Sentence

Thereupon the Court sentenced the Defendant Asa H. Whitfield to pay a fine of $25 and to pay the costs of this case, as appears of record in this case; to which sentence counsel for the Defendant then and there duly excepted.

Thereupon counsel for the Defendant moved the Court for a suspension of the sentence above set forth pending filing of the bill of exceptions; on consideration whereof, the Court granted suspension of said sentence for a period of 10 days from the 3rd day of October, A. D. 1934, and [fol. 20] fixed the bail bond to be given by said Defendant Asa H. Whitfield at the sum of $100.

And thereafter, to-wit, on the 10 day of October, A. D. 1934, being within 10 days after the overruling of said motion for a new trial, and within the time fixed by the Court and allowed by law, the Defendant Asa H. Whitfield filed with the Clerk of this Court this, his bill of exceptions, and prayed that the same might be allowed and signed by the Trial Judge, and filed as, and made a part of, the record in this case; but not spread at large upon the Journal.

Receipt of said bill of exceptions is hereby acknowledged this 10 day of October, A. D. 1934.

(Signed) Peter J. Henry, Clerk, by (Signed) E. J. Patton, Deputy Clerk.

And thereafter, to-wit, on the 10 day of October, A. D. 1934, notice of the filing of this bill of exceptions was duly served upon Michael A. Picciano, Chief Police Prosecutor, and J. J. P. Corrigan, Assistant Police Prosecutor, attorneys for the State of Ohio, the State of Ohio, Plaintiff, being the adverse party herein, by the Clerk of this Court.

And thereafter, to-wit, on the 10 day of October, A. D. 1934, being not less than 10 days after such notice of the filing of said bill of exceptions, and within five days after the expiration of such 10 days, to-wit, —— days after the service of such notice, this bill of exceptions was duly transmitted by the Trial Judge to the Clerk of this Court, [fol. 21] together with all objections and amendments filed thereto.

Receipt of said bill of exceptions and all objections and amendments filed thereto is hereby acknowledged, this 10 day of October, A. D. 1934.

(Signed) Geo. S. Tenesy, Trial Judge.

ORDER ALLOWING BILL OF EXCEPTIONS

And now, upon the 10th day of October, A. D. 1934, being within five days after the receipt of said bill of exceptions and all objections and amendments filed thereto, from said Clerk, and upon due consideration of the same, said bill of exceptions is hereby allowed and signed by the Court, and it is ordered that the same be transmitted to the office of the Clerk of this Court, forthwith, and that the same be filed as, and made a part of, the record in this case, but not spread at large upon the Journal.

(Signed) Geo. S. Tenesy, Trial Judge.

[fol. 22] IN THE MUNICIPAL COURT OF CLEVELAND

[Title omitted]

STIPULATION OF FACTS

It is hereby agreed and stipulated by and between counsel for the State of Ohio and counsel for the defendant, that the facts and the evidence in the above captioned case is as follows:

Stipulation as to First Count

That on the 2nd day of October, A.D. 1934, the Defendant, Asa H. Whitfield of Montgomery, Alabama, as agent for the State of Alabama, sold to R. C. Kissack, in the City of Cleveland, Ohio, on the open market, to-wit, at the Cleveland Hotel, one dozen Chambray Men's Work Shirts for the consideration of $5.25; that said shirts were manufactured in whole by prisoners, confined in Wetumpka Prison in the State of Alabama; that said prisoners at the time of manufacturing said shirts were not on parole or probation; that said shirts were shipped into the City of Cleveland, Ohio via U. S. Parcel Post from Wetumpka Prison, State of Alabama, to be sold on the open market, in said City of Cleveland, Ohio; that said goods were sold in the [fol. 23] original package, as shipped by interstate commerce into the state of Ohio; that there is nothing harmful, injurious or deleterious about the goods sold.

Stipulation as to Second Count

That on the 2nd day of October, A. D. 1934, the defendant, Asa H. Whitfield, of Montgomery, Alabama, as agent for the State of Alabama sold to R. C. Kissack, in the City of Cleveland, Ohio, on the open market, to-wit, at the Hotel Cleveland, 6 dozen Chambray Men's Work Shirts, for the consideration of $31.50; that the said shirts were not then delivered to the said R. C. Kissack but the defendant, Asa H. Whitfield, agreed to ship same to the residence of R. C. Kissack which is in Lakewood, Ohio, via Railway Express, from Wetumpka Prison in the State of Alabama; that the said shirts have been manufactured in whole by prisoners confined in Wetumpka Prison in the State of Alabama; that said prisoners at the time they manufactured said shirts, were not on parole or probation; that said goods were sold in the original package, as shipped by interstate commerce into the State of Ohio; that there is nothing harmful, injurious or deleterious about the goods sold.

(Signed) Michael A. Picciano, Attorney for the State of Ohio. (Signed) Malcolm E. Molner, Attorney for Defendant.

[fol. 24] IN THE COURT OF APPEALS

No. 14526

ASA H. WHITFIELD, Plaintiff-in-error,

vs.

STATE OF OHIO, Defendant-in-error

PETITION IN ERROR—Filed October 16th, 1934

Plaintiff-in-error, Asa H. Whitfield, for his petition-in-error, says that at the September, A. D. 1934, term of the Municipal Court of Cleveland, Criminal Division, in a criminal action therein pending, being cause #38,497 on the docket of said Court, wherein the defendant-in-error, State of Ohio, was plaintiff and the plaintiff-in-error, Asa H. Whitfield, was defendant, by the decision of the Court, said plaintiff-in-error was found guilty of violating Section 2228-1 of the General Code of the State of Ohio, as charged by the defendant-in-error, and was fined Twenty-five Dollars ($25.00) together with the costs of said action; that a transcript of the docket and Journal Entry and the original pleadings and papers, including the Bill of Exceptions, are filed with this petition-in-error.

There is error in the said record and proceedings prejudicial to the rights of this plaintiff-in-error, in this, to-wit:

1. The court erred in overruling the motion for a new trial by the plaintiff-in-error.

2. That the said judgment is contrary to law and against the weight of the evidence.

3. The court erred in overruling the Deummer of this [fol. 25] plaintiff-in-error.

4. The court erred in admitting evidence over the objections of the plaintiff-in-error and to which exceptions were duly noted at the time.

5. The court erred in overruling the motion of the plaintiff-in-error to direct a verdict at the close of the testimony of the plaintiff below.

6. The court erred in overruling the motion of the plaintiff-in-error to direct a verdict at the close of the testimony of the case.

7. The verdict is contrary to the Constitution of the United States of America.

8. The Court erred in overruling the Motion of the Plaintiff-in-error to quash the warrant issued on behalf of the plaintiff below.

9. For other errors on the face of the record prejudicial to the rights of the plaintiff-in-error.

Wherefore, the plaintiff-in-error prays that said judgment may be reversed and that he may be restored to all things lost thereby.

Malcolm E. Molner, Morton M. Stotter, Attys. for Plaintiff-in-error.

The defendant-in-error hereby waives the issuance of summons-in-error on the within petition-in-error and voluntarily enters his appearance herein this 16th day of October, 1934.

J. J. P. Corrigan, Atty. for Defendant-in-error.

[fol. 26] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 27] IN THE COURT OF APPEALS

[Title omitted]

DOCKET ENTRIES

October 16, 1934—Petition in error, waiver of summons in error and entry of appearance of defendant in error filed.

October 20, 1934—Original papers and Bill of Exceptions filed.

December 24, 1934—Brief of plaintiff in error, and two copies filed.

February 11, 1934—Brief of Defendant in error, and two copies filed.

February 11, 1935—Brief of Amici Curiae, and two copies filed.

February 18, 1935—To Court.

JUDGMENT

This cause came on to be heard upon the pleadings, and the transcript of the record in the Municipal

Court of the City of Cleveland, and was argued by counsel; and on consideration of all the assigned errors, the Court being of the opinion that substantial justice has been done the party complaining, the judgment of the said Municipal Court is affirmed, there being, however, in the opinion of the Court, reasonable ground for this proceeding in error. It is therefore considered that said defendant in error recover of said plaintiff in error its costs herein. Ordered, that a special mandate be sent to said Municipal Court, to carry this judgment into execution. The Plaintiff in error excepts.

Journal 10, Page 517.

February 25, 1935—Mandate, Original Papers and Bill of Exceptions to Police Court.

[fol. 28] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 29] IN COURT OF APPEALS OF OHIO

[Title omitted]

MANDATE

This Cause came on to be heard upon the pleading, and the transcript of the record in the Municipal Court of the City of Cleveland, and was argued by counsel; and on consideration of all the assigned errors, the Court being of the opinion that substantial justice has been done the party complaining, the judgment of the said Municipal Court is affirmed there being, however, in the opinion of the Court, reasonable ground for this proceeding in error.

It is therefore considered that said defendant in error recover of said plaintiff in error its costs herein.

Ordered, that a special mandate be sent to said Municipal Court, to carry this judgment into execution. The plaintiff in error excepts. John J. Busher, Clerk of our said Court of Appeals, do hereby certify that the foregoing entry is truly taken and correctly copied from the Journal of said Court.

Witness, my hand and the seal of said Court, at Cleveland, this 18th day of Februrary A.D. 1935.

John J. Busher, Clerk. By (Signed) Edward (illegible), Deputy. (Seal.)

[fol. 30] COURT OF APPEALS OF OHIO, EIGHTH DISTRICT, CUYAHOGA COUNTY

To the Honorable Municipal Court in and for the City of Cleveland, Ohio, Greeting:

You are hereby commanded, that without delay, you cause the foregoing judgment of our said Court of Appeals to be carried into complete execution.

Witness, John J. Busher, Clerk of our said Court of Appeals, and the seal thereof, at Cleveland, this 18th day of February, A.D. 1935.

John J. Busher, Clerk. By (Signed) Edward (illegible), Deputy. (Seal).

[fol. 31] IN THE SUPREME COURT OF OHIO

ASA H. WHITFIELD, Plaintiff-in-error,

vs.

STATE OF OHIO, Defendant-in-error

PETITION-IN-ERROR—Filed March 14, 1934

The above named Plaintiff-in-error, Asa H. Whitfield, complains of the defendant-in-error, the State of Ohio, for that on the 3rd day of October, 1934, the Municipal Court of Cleveland, Ohio, adjudged and imposed sentence against him, in that he be fined $25.00 and that he pay the costs of prosecution against him in a certain criminal action then pending in said court wherein he was defendant and the State of Ohio was plaintiff, and which criminal action was founded on a certain warrant charging him with having sold and offered for sale on the open market in the City of Cleveland, one dozen Chambray Men's Work shirts for the consideration of $5.25; that said shirts were manufactured in whole by prisoners confined at Wetumpka Prison in the State of Alabama; that said prisoners at the [fol. 32] time of manufacturing said shirts were not on parole or probation; that said shirts were shipped into the City of Cleveland, Ohio, via United States Parcel Post from Wetumpka Prison in the State of Alabama, to be sold on the open market, in said City of Cleveland, Ohio, and further;

That on the 2nd day of October, A.D. 1934, the Defendant, Asa H. Whitfield, of Montgomery, Alabama, as agent for the State of Alabama, sold to R. C. Kissack, in the City of Cleveland, Ohio, on the open market, to-wit, at the Hotel Cleveland, six dozen Chambray men's work shirts, for the consideration of $31.50; that the said shirts were not then delivered to the said R. C. Kissack, but the defendant, Asa H. Whitfield, agreed to ship same to the residence of R. C. Kissack which is in Lakewood, Ohio, via Railway Express, from Wetumpka Prison in the State of Alabama; that the said shirts have been manufactured in whole by prisoners confined in Wetumpka Prison in the State of Alabama; that said prisoners at the time they manufactured said shirts, were not on parole or probation, all in violation of Section 2228-1 of the General Code of Ohio.

The plaintiff-in-error instituted proceedings in error in the Court of Appeals of Cuyahoga County for a reversal of the judgment and finding against him, the same being No. 14526 on the docket of said Court, and on hearing of the same said Court of Appeals affirmed the said judgment.

A true, complete and duly certified transcript of the record and proceeding had in said cause together with the original papers is filed herewith and made a part hereof. [fol. 33] The plaintiff-in-error says that there is prejudicial error against him in said record and proceeding had in said cause in this, to-wit:

1. Said Court of Appeals erred in finding no error and erred in affirming the judgment of said Municipal Court of Cleveland.

2. That the Municipal Court of Cleveland erred in overruling the motion of the plaintiff-in-error to quash the warrant issued by the plaintiff below; that said Municipal Court of Cleveland erred in overruling the motion made by the plaintiff-in-error for a new trial; erred in rendering judgment and imposing sentence against him; erred in overruling the motion for directed verdict in his favor and that he be discharged; error in overruling the demurrer of this plaintiff-in-error; erred in admitting evidence over the objections of the plaintiff-in-error and to which exceptions were duly noted at the time; erred in overruling the motion of the plaintiff-in-error to direct a verdict at the close of the testimony of the case; for other errors on the

face of the record prejudicial to the rights of the plaintiff-in-error.

3. That the verdict is contrary to the Constitution of the United States of America.

Wherefore Plaintiff-in-error prays this Court that the [fol. 34] judgment of the said Court of Appeals and of the said Municipal Court of Cleveland, Ohio, be reversed, set aside and held for naught; that this Court render the judgment that said Courts ought to have rendered; that plaintiff-in-error be restored to all things he has lost by reason of said erroneous judgments and for all proper relief in the premises.

(Signed) Malcolm E. Molner, Morton M. Stotter,
Attorneys for Plaintiff-in-error.

Acknowledgment

The undersigned, attorneys of record for the above named defendant-in-error, hereby acknowledge service of notice of the filing of the above petition-in-error and receipt of copy of said petition-in-error this 12th day of March, 1934.

(Signed) J. J. Corrigan, Central Police Station,
—— ——, Attorneys for Defendant-in-error.

[fol. 35] Acknowledgment of Service, Waiver of Service and Entry of Appearance

We, hereby acknowledge receipt of a copy of the petition-in-error by copy, and do hereby waive the issuance of summons thereon and enter appearance therein, in case #25308 in the Supreme Court of Ohio, same being Asa H. Whitfield, plaintiff-in-error, vs. State of Ohio, defendant-in-error. The issuance of summons in error is hereby expressly waived.

(Signed) Stephen Gobozy, Attorney for the State of
Ohio, Defendant-in-error.

[fol. 36] IN THE SUPREME COURT OF OHIO

[Title omitted]

MOTION TO CERTIFY THE RECORD

Now comes Asa H. Whitfield, plaintiff-in-error, herein, and plaintiff-in-error in the Court of Appeals of Cuyahoga County, Ohio, and moves this Court for an order directing the Court of Appeals of Cuyahoga County, Ohio, to certify its record to the Supreme Court of Ohio, in the cause of Asa H. Whitfield, plaintiff-in-error, vs. State of Ohio, defendant-in-error, being cause #14526, on the docket of said Court of Appeals of Cuyahoga County, Ohio, wherein the said Court of Appeals sustained and affirmed the judgment and sentence of the Municipal Court of Cleveland, in that the plaintiff-in-error be fined $25.00 and pay the costs therein for the following reasons, to-wit:

1. That the Court of Appeals erred in finding no error and erred in affirming the judgment of said Municipal Court of Cleveland.

[fol. 37] 2. That the Municipal Court of Cleveland erred in overruling the motion of the plaintiff-in-error to quash the warrant issued by the plaintiff below; that said Municipal Court of Cleveland erred in overruling the motions made by the plaintiff-in-error for a new trial; erred in rendering judgment and imposing sentence against him; erred in overruling the motion for a directed verdict in his favor and that he be discharged; erred in overruling the demurrer of this plaintiff-in-error; erred in admitting evidence over the objections of the plaintiff-in-error, and to which exceptions were duly noted at the time; erred in overruling the motion of the plaintiff-in-error to direct a verdict at the close of the testimony of the case; for other errors on the face of the record prejudicial to the rights of the plaintiff-in-error.

3. That the verdict is contrary to the Constitution of the United States of America.

4. That the cause is of both public and great general interest.

5. That the cause of the plaintiff-in-error involves a debatable question involving the constitution of the United States of America.

Wherefore Plaintiff-in-error, Asa H. Whitfield, prays this Honorable Court for an order directing the Court [fol. 38] of Appeals of Cuyahoga County, Ohio, to certify its record in cause No. 14526 on the docket of said Court of Appeals to the Supreme Court of Ohio.

(Signed) Malcolm E. Molner, Morton M. Stotter, Attorneys for Plaintiff-in-error.

Notice

The defendant-in-error will take notice that the plaintiff-in-error, Asa H. Whitfield, intends to file forthwith, in the Supreme Court of Ohio, the foregoing motion and that the same will be for hearing in accordance with the rules of said court on a date to be fixed by the Clerk, notice of which will be given to counsel for defendant-in-error as required by the rules of said court.

(Signed) Malcolm E. Molner, Morton M. Stotter, Attorneys for Plaintiff-in-error.

Acknowledgment

The undersigned, attorneys of record for the above named defendant-in-error hereby acknowledge service of notice of the filing and the time of hearing of the above motion and receipt of a copy of said motion and notice of counsel for plaintiff-in-error in support of said motion this 12 day of March, 1935.

(Signed) J. J. Carrigan, Attorney for Defendant-in-error.

[fol. 39] In the Supreme Court of Ohio

[Title omitted]

Application for Stay

Now comes the plaintiff-in-error and moves this Honorable Court for an order staying the proceedings herein and the execution of the sentence and judgment against this plaintiff-in-error heretofore rendered in the Municipal Court of Cleveland, Ohio, until such time as this Court hears and determines the motion of the plaintiff-in-error for leave to file his petition-in-error in this Court.

(Signed) Malcolm E. Molner, Morton M. Stotter, Attorneys for Plaintiff-in-error.

Notice

The Defendant-in-error will take notice that the plaintiff-in-error, Asa H. Whitfield, intends to file forthwith, in the Supreme Court of Ohio, the foregoing motion and that same will be for hearing in accordance with the rules of said Court, notice of which will be given to counsel for [fol. 40] defendant-in-error as required *to* the rules of said court.

(Signed) Malcolm E. Molner, Morton M. Stotter,
Attorneys for Plaintiff-in-error.

Acknowledgment

The undersigned, Attorneys of record for the above named defendant-in-error, hereby acknowledge service of notice of the filing and the time of hearing of the above motion and receipt of a copy of said motion and notice of counsel for plaintiff-in-error in support of said motion this 5th day of March, 1934.

(Signed) Stephen Gobozy, Attorney for Defendant-in-error.

[fol. 41] In The Supreme Court of Ohio

[Title omitted]

Order Suspending Judjment—March 14, 1935

This day, this cause came on to be heard upon the application of the Plaintiff-in-error for an order to stay the execution of the final judgment in this proceeding rendered by the Municipal Court of Cleveland, Ohio, until this court hears and determines the motion of the plaintiff-in-error for leave to file his petition-in-error in this court, and the court or a Judge thereof being fully advised sustains said motion.

It is therefore ordered that the sentence and fine heretofore imposed upon the said Asa H. Whitfield, plaintiff-in-error, be suspended until such time as is required for the hearing and decision of the motion of the plaintiff-in-error for leave to file his petition-in-error and the Clerk of this Court is directed to forthwith transmit to the Municipal Court of Cleveland, Ohio, a true copy of this order.

(Signed) Arthur H. Day, Judge.

[fol. 42] IN THE SUPREME COURT OF OHIO

[Title omitted]

MOTION TO STRIKE PETITION IN ERROR—Filed April 5, 1935

Now comes the State of Ohio, defendant in error, and respectfully moves this Honorable Court to strike the Petition in Error from the files and dismiss the proceedings in error for the following reasons, to-wit:

1. That there is no reversible error in the record.

2. That substantial justice was had by plaintiff in error.

Wherefore, defendant in error submits that this Motion to Strike should be allowed.

(Signed) Ezra Z. Shapiro, Director of Law; Michael A. Piccano, Assistant Director of Law, in Charge of Criminal Branch; Stephen Gobozy, J. J. P. Corrigan, Assistant Prosecutors, Attorneys for Defendant-in-Error.

[fol. 43] Acknowledgment

Plaintiff in Error acknowledges receipt of the foregoing motion and accompanying brief this 3rd day of April, 1935.

(Signed) Malcolm E. Molner, Morton M. Stotter, Attorneys for Plaintiff-in-Error.

[fol. 44] IN THE SUPREME COURT OF OHIO

[Title omitted]

APPLICATION FOR REHEARING—Filed May 22, 1935

Application is hereby respectfully made to this Honorable Court for a rehearing in the above entitled cause upon the motion of the plaintiff-in-error to certify the record of the Court of Appeals of Cuyahoga County in this cause, and upon the petition-in-error filed as of right by the plaintiff-in-error herein, and on the motion of the defendant-in-error to strike the petition-in-error.

Both the petition-in-error and the motion of the plaintiff-in-error to certify the record of the Court of Appeals

in the above case raise the constitutional questions arising under the Constitution of the United States of America of the right of the Congress of the United States of America to divest itself of the right to regulate the interstate shipment of convict made goods manufactured by convict labor [fol. 45] in the various states of the union. The Petition-in-error and the Motion of the plaintiff-in-error to certify the record also raise the constitutional question arising under the Constitution of the United States of America of the right of the Congress of the United States of America to divest such goods of their interstate character; and of the right of the General Assembly of Ohio to enact section 2228-1, General Code of Ohio, which reads as follows:

"After January 19, 1934, no goods, wares or merchandise, manufactured or mined, wholly or in part, in any other state by convicts, or prisoners, except convicts or prisoners on parole or probation, shall be sold on the open market in this State."

The Act of Congress in question is the Hawes-Cooper Act, 45 Statutes at Large, 1984. Chapter 79 of the Act is the object contended by plaintiff-in-error, which violates Article I, section I; the "Commerce clause" and the Tenth Amendment to the Constitution of the United States.

It is contended that Congress, by divesting convict made goods of their interstate character has unlawfully delegates its powers to the various state legislatures.

"* * * it may be admitted, that Congress cannot give a right to a state in virtue of its own powers * * *" Gibbons vs. Ogden, 9 Wheat. 1, 2020.

"* * * nor can Congress transfer legislative powers to a state, nor sanction a state law in violation of the constitution; * * *" In re: Rahrer 140 U. S. 545, 560.

The Court of Appeals has upheld the validity of these statutes stating that prison made goods can be sold in the [fol. 46] open market at a price which is below the actual cost or production of manufacturers employing free labor. We fail to agree with the learned Court's reason. That question has been determined by the United States Supreme Court in the case of Hammer vs. Dagnhart, 247 U. S. 251. We quote from the court's opinion:

"The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the states who employ children within the prohibited ages. The Act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states. The goods shipped are of themselves harmless."

And again, the United States Supreme Court in the case of Clark Distilling Company vs. Railway, 242, U. S. 311, held as follows:

"In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guarantees of the constitution embrace."

The above case referred to the interstate transportation of intoxicating liquors, and because of the exceptional nature of the goods, and because of the strong language which the court employed it must be presumed that the instant case does not fall into that class of exceptions set forth in the above case.

And the Supreme Court of the United States, commenting directly upon the question of economic disadvantages stated in the case of Hammer vs. Dagenhart (supra) as follows:

"There is no power vested in Congress to require the [fol. 47] states to exercise a police power so as to prevent unfair competition. Many causes may co-operate to give one state by reason of local laws or conditions, an economic advantage over others. The commerce clause was not intended to give to Congress a general authority to equalize such conditions."

The Ohio Supreme Court in the case of Arnold vs. Yanders, 56 O.S. 417 (a case involving the right of the State of Ohio to regulate the sale of convict made goods) stated:

"The Act in question is not a police regulation, but an attempt to prevent or at least discourage, the importation of convict made goods from other states, and thereby pro-

tect our citizens, laborers and markets against such goods." (page 421.)

The Court further held in the same case that—

"The police power is reserved to the states, and they have the right to regulate internal trade, so as to protect the health and public welfare of the people, but this power cannot be so extended as to encroach upon interstate commerce; * * *"

It will be noted from the record that it was stipulated in the lower court upon the trial of the case that the goods in question are not harmful, injurious or deleterious in their nature.

It therefore follows that since there is no exceptional nature about the goods in question so as to require the General Assembly of Ohio to prohibit the sale thereof, and that since Congress cannot properly enact the Hawes-Cooper Act, upon which the Ohio Act rests, there is no constitutional authority properly given to the States, and that authority failing this court is bound to follow its ruling in the case of Arnold vs. Yanders (supra).

We respectfully submit that we have before us the first [fol. 48] step toward the establishment of unconstitutional trade barriers set up by the State of Ohio against other states. Obviously, if these acts are valid, what is to prevent the ban on goods made by Chinese, Negro or any other class of labor? Or what is to prevent the prohibition of non-union made goods. The object of the Acts is plainly seen. It is to free labor organizations and certain manufacturers from the competition of prison made labor infinitesimally slight though it be. To open the door to such legislation is to erect light barriers in favor of any activity, industry or organization which becomes politically strong enough to compel favorable legislation. To day it is prison labor, tomorrow it may be anything else.

It is respectfully submitted that this application for rehearing should be granted.

(Signed) Malcolm E. Molner, Morton M. Stotter,
Attorneys for Plaintiff-in-error.

[fol. 49] Notice

The defendant in error will take notice that the plaintiff in error, Asa H. Whitfield, intends to file forthwith, in the

Supreme Court of Ohio, the foregoing application for rehearing.

(Signed) Malcolm E. Molner, Morton M. Stotter, Attorneys for Plaintiff-in-Error.

Acknowledgment

The undersigned attorneys of record for the above named defendant in error hereby acknowledges service of the filing of the above application for rehearing and receipt of a copy of said application and notice this 20th day of May, 1934.

(Signed) Stephen Gobozy, Attorneys for Defendant in Error.

[fol. 50] IN THE SUPREME COURT OF OHIO

DOCKET AND JOURNAL ENTRIES

Attorneys: For plaintiff in error, Malcolm E. Molner, Morton M. Stotter, Cleveland;

For defendant in error, Ezra Z. Shapiro, Michael A. Picciano, Stephen Gobozy, J. J. P. Corrigan, Cleveland.

Action: Motion for an order directing the Court of Appeals of Cuyahoga County to certify its record.

Error to the Court of Appeals of Cuyahoga County.

Memoranda of Pleadings, etc., Filed, Writs Issued, Judgments, Orders and Decrees

March 14, 1935—Petition in error as of right and acknowledgment of service filed.

March 14, 1935—Motion for an order to certify record, notice and proof of service filed.

March 14, 1935—Application of plaintiff in error for stay, notice and proof of service filed.

March 14, 1935—Entry staying execution of sentence until final determination of this cause, Arthur H. Day, J., J. 33-651.

March 14, 1935—Plaintiff's brief on motion and proof of service filed.

[fol. 51] March 18, 1935—Waiver of Summons and entry of appearance of Petition in error filed.

March 18, 1935—Transcript of docket and journal entries of Court of Appeals filed.

April 5, 1935—Motion by defendant in error to dismiss petition in error filed as of right, defendants brief on motion and proof of service filed.

May 15, 1935—Motion for an order directing the Court of Appeals of Cuyahoga County to certify its record overruled. Journal 33, page 698.

May 15, 1935—Motion by defendant in error to dismiss petition in error filed as of right sustained. J. 33-698.

May 15, 1935—Dismissed, no debatable constitutional question involved. J. 33-702.

May 22, 1935—Application for rehearing filed and proof of service filed.

May 25, 1935—Original papers and bill of exceptions filed.

May 29, 1935—Rehearing denied. J. 33-720.

June 10, 1935—Docket entries of Municipal Court filed.

June 12, 1935—Court of Appeals Transcript of Docket and journal entries and Petition in error filed in Court of Appeals filed.

Journal Entries.

March 14, 1935—This day this cause came on to be heard upon the application of plaintiff in error for an order to stay the execution of the final judgment in this proceeding rendered by the Municipal Court of Cleveland, Ohio, until this court hears and determines the motion of the plaintiff in error for leave to file his petition in error in this court, and the court or a Judge thereof being fully advised sustains said motion.

[fol. 52] It is therefore ordered, that the sentence and fine heretofore imposed upon the said Asa H. Whitfield, plaintiff in error, be suspended until such time as is required for the hearing and decision of the motion of the plaintiff in error for leave to file his petition in error and the Clerk of this Court is directed to forthwith transmit to the Municipal Court of Cleveland, Ohio, a true copy of this order. Arthur H. Day, Judge. J. 33-651.

May 15, 1935. Motion for an order directing the Court of Appeals of Cuyahoga County to certify its record. It is ordered by the Court that this motion be and the same is hereby overruled. Journal 33, page 698.

May 15, 1935. Motion by defendant in error to dismiss petition in error filed as of right. It is ordered by the Court that this motion be and the same is hereby sustained. Journal 33, 698.

ORDER DISMISSING PETITION IN ERROR

May 15, 1935. Error to the Court of Appeals of Cuyahoga County. This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County, upon the motion of defendant in error to dismiss the petition in error, filed as of right herein, and was argued by counsel. On consideration whereof, it is ordered and adjudged that said petition in error be, and the same is hereby, dismissed for the reason no debatable constitutional question is involved in said cause. It is further ordered and adjudged that the defendant in error recover from the plaintiff in error his costs herein expended, taxed at $——. Ordered, That a special mandate be sent the Municipal Court of the City of Cleveland, Ohio, to carry this judgment into execution. Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Cuyahoga County, "for entry." Journal 33, page 702.

ORDER DENYING REHEARING

May 29, 1935. Rehearing Docket. It is ordered by the Court that the application for rehearing herein be, and the same hereby is, denied. Journal 33, page 720.

[fol. 53] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 54] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1935

No. 377

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the Supreme Court of the State of Ohio is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.